STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY Application of COMMONWEALTH EDISON COMPANY, for a Certificate of Public Convenience and Necessity, pursuant to Section 8- 406, and an order, pursuant to Section 8-503, of the Illinois Public Utilities Act, authorizing and directing the Petitioner to construct, operate and maintain a new 138,000 volt electric transmission line in Kane and McHenry Counties, Illinois.	)	Docket No. 07-0310

REPLY BRIEF OF HOWARD E. REID

April 18, 2008

Stephen J. Moore
Thomas H. Rowland
Kevin D. Rhoda
Rowland & Moore LLP
200 West Superior Street, Suite 400
Chicago, Illinois 60610
(312) 803-1000 (voice)
(312) 803-0953 (fax)
ATTORNEYS FOR HOWARD E. REID

I. INTRODUCTION

Neither Commonwealth Edison Company ("ComEd") nor the ICC Staff addressed the factual support for the position taken by Howard E. Reid that the proposed line along the southwest side of the Northwest Tollway will interfere with the operation of Reid RLA. Rather, both claim Mr. Reid cannot obtain a prescriptive easement in this circumstance. As shown below, both ComEd and the Staff are wrong. In any event, neither ComEd nor the Staff can refute the fact that the authority to regulate this nation's airspace is held exclusively by the Federal Aviation Administration ("FAA"). Thus, this Commission cannot authorize ComEd to construct a transmission line that would interfere with this nation's airspace – in this case, take-offs and landings from an airport licensed by the State of Illinois and the federal government.

II. LEGAL ARGUMENT

The unrebutted facts show that the proposed transmission line will have a significant adverse impact on operations at Reid RLA. The next issue is whether ComEd has a legal duty to avoid such interference. As shown below, it has such a duty.

A. Howard Reid Has A Prescriptive Easement For the Glide Paths Used at Reid RLA.

1. Staff Brief

Staff argues that there are five defects to the argument that Mr. Reid has acquired a prescriptive easement that prevents the construction of the proposed line in a manner that would interfere with operations of Reid RLA.

> [F]irst, *no* Illinois court has ever recognized a prescriptive easement of the type alleged to exist by Reid; second, few courts of any description have ever done so; third, the better reasoned court decisions regarding such

> easements conclude that it would be extraordinarily difficult to prove the existence of any such easement; fourth, even if the existence of such an agreement could be demonstrated in Illinois, Reid cannot do so in this case; and fifth, even if Reid enjoys such an easement, the Commission is in no position to recognize it.
>
> Staff Initial Brief at 17.

Staff is wrong on all five counts.

First, while no Illinois court has recognized an avigation easement [1] acquired by prescription, that should certainly not be a determining factor. This is a fact situation that has simply not arisen before in this State, thus it is not surprising that no Illinois court has faced a decision such as the one before this Commission.

As for the second and third staff arguments, Mr. Reid cited three cases that found that an avigation easement can indeed be acquired by prescription. All three cases are well reasoned. *Michigan Chrome and Chemical Company v City of Detroit*, 1993 U.S. App. LEXIS 28028 (Sixth Cir. 1993); *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, 220 Cal. App. 3d 1602, 1609 (Cal. App. 2nd Dist. 1990); *Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10, 14 (Cal. App. 2nd Dist. 1989). (See Reid Initial Brief at 17). The Staff brief acknowledges the Baker decision and adds another case not referred to in Mr. Reid's brief, *Christie v. Miller*, 79 Ore. App. 412; 719 P.2d 68; 1986 Ore. App. Lexis 2853 (Ore. App. 1985). While the Staff brief attempts to distinguish those cases away by the nature of each airport's operations (Staff Initial Brief 21-21), the simple fact remains that Mr. Reid has been using his airport in approximately the same way for far longer than necessary to acquire a prescriptive easement.

[1] Mr. Reid agrees with the Staff's analysis in footnote 3 of its Initial Brief that he is alleging the acquisition of an avigation easement and not a clearance easement

While Staff is correct that Illinois courts have held that one property owner may not acquire a prescriptive right to air, light, or ventilation over the land of another. *See* Cain v. Amer. Nat'l Bank, 26 Ill. App. 3d 574, 579; 325 N.E.2d 799, 804; 1975 Ill. App. Lexis 1935 at 10 (1st Dist. 1975) (Staff Initial Brief at 18), such cases would be in conflict with federal law if applied to our nation's airways because they are firmly within federal jurisdiction. As noted in Mr. Reid's initial brief, the State of Illinois is preempted from interfering with our nation's airways, including the airspace necessary for landing and take-off.

Staff's fourth argument is that Mr. Reid did not show that "his use in any way interferes with the Toll Highway Authority's enjoyment of its property in light of the property's current actual use as an interstate toll highway." The Staff then argues that occasional flights over the Tollway could not have "interfered" with the operation of the Tollway because the thousands of cars passing beneath landing or taking off planes were just as noisy and polluting as the aircraft. (Staff Brief at 23). While it may be true that there was no interference with the Tollway, "interference" is not the standard used in Illinois to determine if a prescriptive easement has be acquired. To acquire a prescriptive easement, a claimant must show that its use of the land was: (1) open; (2) adverse; (3) continuous and uninterrupted; and (4) under a claim of right for a period of 20 years or more. *Petersen v. Corrubia, 21 Ill. 2d 525, 531, 173 N.E.2d 499, 502 (1961)*; *Sparling v. Fon du Lac Township, 319 Ill. App. 3d 560, 745 N.E.2d 660, 253 Ill. Dec. 537 (2001)*. Thus, the test is "adverse" not "interfere." Of course, cars could still travel on the Tollway. But that does not change the fact that it was adverse to the drivers traveling along the Tollway to have large, noisy planes flying just above them as they drove by

Reid RLA. In any event, where the property has been used in an open, uninterrupted, continuous and exclusive manner for the required period, adversity will be presumed and the burden of proof shifts to the party denying the prescriptive easement to rebut the presumption. *Wehde, 237 Ill. App. 3d 664, 604 N.E.2d 446, 178 Ill. Dec. 190*.

Finally, Staff argues that this Commission has no jurisdiction to determine if Mr. Reid is correct that he has acquired an easement. (Staff Brief at 23-24). Mr. Reid agrees that he would not be able to take the final order from this Commission and record it in county property records as a legally determined easement. But that should not stop this Commission from making a determination here that ComEd's proposed line is not the best alternative. If this Commission believes that Mr. Reid has a valid easement or it believes, as stated in Mr. Reid's initial brief, that it has no authority to approve the construction of a power line that would interfere with federally protected airspace, then is should deny ComEd's request.

2. ComEd Brief

ComEd provides two arguments. First, it says that it is not possible to obtain a prescriptive easement over state owned property such as the Tollway. Second, it argues that this Commission is not the appropriate authority before which to raise the issue of prescriptive easement. ComEd's second argument is similar to the fifth argument of the Staff, which was refuted above. The first argument of the Company is equally invalid.

It is important to note the precise language used by the two cases cited by ComEd: "the statute of limitations does not run against a municipal corporation in respect to property held for public use." *Chicago Steel Rule Die & Fabrications Co. v. Malan Const. Co.*, 200 Ill. App. 3d 701, 709 (1st Dist. 1990); "Adverse possession does not run

against a governmental body regarding property devoted to public use." *People ex rel. Kenney v. City of Goreville*, 154 Ill. App. 3d 1091, 1098 (5th Dist. 1987). In both cases (and in the cases relied upon by those courts) the Court used the phase: "property devoted to public use." Mr. Reid is not claiming adverse possession of the portion of the property devoted to public use, the roadway itself. Rather, he is claiming adverse possession of the air well above the roadway and outside of any public use.

ComEd, the entity that Mr. Reid's claim is being made against, is not a governmental body. Rather, it is a private corporation. Of course, ComEd has the ability, with this Commission's authority, to exercise eminent domain in order to acquire property it needs to build its line. Thus, putting aside the issue of federal jurisdiction over Reid RLA, it may be possible for ComEd to acquire the avigation easement held by Reid RLA through eminent domain. But at this time, it is not indicating any intention of doing so.

B. The Federal Government Has Exclusive Control of Airspace.

Neither ComEd nor the Commission Staff addressed Mr. Reid's argument that Congress has preempted state regulation of navigable airspace pursuant to its *Commerce Clause.* The Commission therefore has no jurisdiction to allow ComEd to interfere with the operation of Reid RLA.

III. CONCLUSION

As set forth in Mr. Reid's Initial Brief and as argued above, this Commission should require ComEd to take steps to avoid interfering with the safe landing and take-off from the two runways at Reid RLA – either burying the offending portions of the line or

relocating those sections. The failure to do so would interfere with the avigation easement held by Mr. Reid and would be contrary to the federal regulation of this nation's airspace.

Dated: April 18, 2008

Respectfully submitted,
Howard E. Reid

/s/ *Stephen J. Moore*
By: Stephen J. Moore

Stephen J. Moore
Thomas H. Rowland
Kevin D. Rhoda
Rowland & Moore LLP
200 West Superior Street, Suite 400
Chicago, Illinois 60610
(312) 803-1000 (voice)
(312) 803-0953 (fax)
steve@telecomreg.com

ATTORNEYS FOR HOWARD E. REID.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Howard E. Reid's Initial Brief has been served upon the parties on the service list in this docket kept by the Clerk of the Illinois Commerce Commission on the 18 day of April, 2008, by electronic mail.

/s/ *Stephen J. Moore*
Stephen J. Moore
Rowland & Moore LLP
200 West Superior Street
Suite 400
Chicago, Illinois 60610
(312) 803-1000
steve@telecomreg.com

ATTORNEY FOR HOWARD E. REID